Petition

81-1454

Office - Supreme Court, U.S.
FILED
FEB 1 1982
ALEXANDER L. STEVAS,
CLERK

No.

In The

Supreme Court of the United States

October Term, 1981

Paul J. Cianci, Et Al,
Petitioner,
v.
Division of Liquor Control
Department of Business Regulation,
Respondent.

and

Victor R. Dydyn, Et Al,
Petitioner,
v.
Division of Liquor Control
Department of Business Regulation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

Alan Neigher, *Counsel of Record*
Leslie Byelas
Steven Mednick
1804 Post Road East
Westport, CT 06880
(203) 259-0599
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

A. May a state bar the petitioners from challenging the constitutionality of an administrative agency regulation by enforcing a two year statute of limitations governing non-compliance with the procedural safeguards of the Uniform Administrative Procedure Act, thereby denying petitioners their ability to protect certain rights under the Fifth and Fourteenth Amendments to the U.S. Constitution?

B. Does the Supreme Court have the power to Review and Strike state decisions which bar litigation of federal claims?

C. Why does Connecticut's two year limitation on challenges to rule making proceedings apply to assertions of non-compliance with the provisions of the Administrative Procedure Act and not to a challenge of the constitutional validity of the regulations?

D. Does the Superior Court Decision that the petitioners' argument challenging the constitutional validity of regulation Section 30-6-A24 (d) and (e) amounted "to a procedural challenge couched in constitutional argument", preclude the court from reviewing the specific constitutional defects?

E. Were Regulations Section 30-6-A24 (d) and (e) of the Division of Liquor Control promulgated in the absence of any evidence, reports or verifiable statistical data which would establish a reasonable basis of said regulations under the due process clause of the Fifth and Fourteenth Amendments of the U.S. Constitution?

F. Did the Division of Liquor Control abuse its discretion by failing to establish an ascertainable standard, rationale purpose, or finding of fact upon which it based Section 30-6-A24 (d) and (e), thereby violating the due process requirements of the Fifth and Fourteenth Amendments of the U.S. Constitution?

G. Does the Twenty-First Amendment of the U.S. Constitution empower a state to promulgate regulations, where basic rights are at issue, superceding the remaining provisions of the Constitution?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Provisions Involved	1
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	25
Appendix	A.1

TABLE OF AUTHORITY

Cases	Page
A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529, 55 S. Ct. 837, 79 L.Ed. 1570 (1935)	21
Amarone v. Brennan, 126 Conn. 451, 454, 11 A.2d 850 (1940)	21
American T & T Co. v. United States, 299 U.S. 232, 236-237, 81 L.Ed. 142, 57 S. Ct. 170 (1936)	15
American Trucking Associations v. United States, 344 U.S. 298, 314, 97 L.Ed. 337, 73 S. Ct. 307 (1953)	15
Assigned Car Cases, 274 U.S. 564, 583, 71 L.Ed. 1204, 47 S. Ct. 727 (1927)	19
Boncal v. Liquor Control Commission, 148 Conn. 648, 650, 173 A.2d 593 (1961)	21
Brinkeroff - Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 379 (1930)	11
Brown v. Western Railways of Alabama, 338 U.S. 294, 298, 94 L.Ed. 100 70 S. Ct. 105 (1949)	11
California v. La Rue, 409 U.S. 109, 115, 34 L.Ed. 2d 343, 93 S. Ct. 390 (1972)	6, 17, 19 24, 25

TABLE OF AUTHORITY

Cases	Page
Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 16 L.Ed. 2d 131, 86 S. Ct. 1018 (1966)	16
Craig v. Boren, 429 U.S. 190, 204-205, 50 L.Ed. 2d 397, 97 S. Ct. 451 (1976)	17, 24
Dadiskos v. Liquor Control Commission, 150 Conn. 422, 426, 190 A.2d 490 (1963)	21
Davis v. Wechsler, 263 U.S. 22, 24, 68 L.Ed. 143, 44 S. Ct. 13 (1923)	10
Enter-Irrigation District v. Canal Co., 243 U.S. 157, 164	10
Ex Parte Siebold, 100 U.S. 371, 394 (1879)	8
Foxriver Paper Co., v. RR Commissioner, 274 U.S. 651	10
Gibbons Co., Inc. v. Archie, 548 P.2d 1366 (1976)	14
Greene v. Louisville and Interurban Rail Co., 244 U.S. 499, 508, 512 et. seq.	10
Hampton v. Mow Sun Wong, 426 U.S. 88, 115, 48 L.Ed. 2d 495, 96 S. Ct. 1895 (1976)	18, 22

TABLE OF AUTHORITY

Cases	Page
Henry v. Mississippi, 379 U.S. 443, 13 L.Ed. 2d 408, 85 S. Ct. 564	11
International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 648 (CADC 1973)	16
Inturri v. Healy, 426 F. Supp. 543, 547 (1977)	17, 24
Lawrence v. State Tax Commissioner of Mississippi, 286 U.S. 276 (1932)	10
Loglisci v. Liquor Control Commission, 123 Conn. 31, 36, 192 A.t. 260	21, 22
McAuliffe v. Carlson, 303 A.2d 746, 30, Conn. Sup. 118, 122 (1972)	14
McCulloch v. Maryland, 4 Wheat 316, 426 (1819)	8
Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 651 (1942)	25
Murphy v. Bergen, 118 Conn. 249, 171 At. 433 (1934)	20
Murphy Inc., v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944)	21

TABLE OF AUTHORITY

Cases	Page
New York State Liquor Authority v. Bellanca, 49 U.S.L.W. 3950, 41 CCH S. Ct. Bull B3689 (1981)	18
Pacific States Box & Basket Co., v. White, 296 U.S. 176, 186, 80 L.Ed. 138, 56 S. Ct. 159 (1935)	14, 15
Page v. Welfare Commissioner, 170 Conn. 258, 262, 365 A.2d 1118 (1976)	21
Panama Refining Co. v. Ryan, 293 U.S. 388, 430, 79 L.Ed. 446, 55 S. Ct. 241 (1935)	21
Public Clearing House v. Coyne, 194 U.S. 497, 48 L.Ed. 1092, 24 S. Ct. 789 (1904)	22
Ragano v. Civil Service Commission, 400 N.E. 2d 97, 100, 80 Ill, App. 3d 523, 35 Ill, Des. 960 (1980)	14
Richter v. Department of Alcoholic Beverage Control, 559 F.2d 1168, 1170 (9th Cir. 1977)	17
Salem Inn, Inc. v. Frank, 522 F.2d., 1045 (1975)	23, 24
Seagram & Sons v. Hostetter, 384 U.S. 35, 52 (1966)	25

TABLE OF AUTHORITY

Cases	Page
Smith v. Cahoon, 283 U.S. 553, 564	10
Social Security Board v. Nierotko, 327 U.S. 358, 90 L.Ed. 718, 66 S. Ct. 637 (1946)	20
Somerich v. New York City Health & Hospital Corp., 416 N.Y. S.2d 455, 98 Misc 2d 736 (1978)	15
Street v. New York, 394 U.S. 576, 583, 22 L.Ed. 2nd 572, 895 Ct. 1354 (1969)	10
United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 32 L.Ed. 2nd, 453, 92 S. Ct. 1941 (1972)	15
United States v. Midwest Video Corp., 406 U.S. 649, 673, 32 L.Ed. 2d 390, 92 S. Ct. 1860 (1972)	15
Ward v. Love City, 253 U.S. 12, 22	10
Women's Liberation Union of Rhode Island v. Israel, 512, F.2d 106, 108 (1st Cir. 1972)	17, 24

TABLE OF AUTHORITY

Statutes	Page
C.G.S. 4-168	2, 13
C.G.S. 4-168(c)	6, 7, 12 13, 17
C.G.S. 4-170	22
C.G.S. 4-183	6, 12
C.G.S. 4-183(g)	12, 14
C.G.S. 4-183(g)(1)	12
C.G.S. 4-183(g)(2)	12
C.G.S. 4-183(g)(2)&(3)	12
C.G.S. 4-183(g)(6)	12
C.G.S. 30-1, et seq.	20
C.G.S. 30-46(a)(4)	20
C.G.S. 51-197(d)	7
Supreme Court Rule	
Rule 17.1(c)	7, 16, 19, 24
Miscellaneous:	
Amendments to Constitution:	
Fifth and Fourteenth Amendments to the Constitution	23

TABLE OF AUTHORITY

	Page
Regulations:	4, 5, 7,
Section 30-6-A24(d)&(e)	12, 16, 20
Texts:	
American Constitutional Law, Tribe p. 285	18
Processes of Constitutional Decision-Making, Cases & Materials 258 (1975)	25
Sutherland Statutory Construction Sands Ed., 4th Ed. (1975), Vol. 3 §65-05, p. 174	22
United States Code:	
28 U.S.C. §1257(3)	1

No.

In The

Supreme Court of the United States

October Term, 1981

Paul J. Cianci, ET AL,

Petitioner,

v.

Division of Liquor Control
Department of Business Regulation,

Respondent.

and

Victor R. Dydyn, ET AL,

Petitioner,

v.

Division of Liquor Control
Department of Business Regulation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

The petitioners Paul J. Cianci, Et Al and Victor R. Dydyn, Et Al respectfully pray that a writ of certiorari issue to review the Order Denying Certification to the Supreme Court of the State of Connecticut entered on October 14, 1981 and the denial of the petitioners' Motion for Reconsideration entered on November 3, 1981.

OPINIONS BELOW

The Supreme Court of the State of Connecticut denied without opinion petitioner's Petition for Certification on October 14, 1981 and denied petitioner's Motion for reconsideration on November 3, 1981. The ruling of the Superior Court, Hartford Judicial District, was rendered on August 5, 1981. The opinion was not reported. It is reproduced in the appendix of this petition. (A.2)

JURISDICTION

The order of the Supreme Court of the State of Connecticut denying certification is dated October 14, 1981 and its denial of the Motion for Reconsideration is dated November 3, 1981. Jurisdiction to review the judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. §1257 (3).

PROVISIONS INVOLVED

AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States,

and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§4-168. Notice prior to action on regulations. Fiscal notes. Hearings. Adoption procedure. Emergency regulations

(c) No regulation adopted after January 1, 1972, is valid unless adopted in substantial compliance with this section. A proceeding to contest any regulation on the ground of noncompliance with the procedural requirements of this section shall be commenced within two years from the effective date of the regulation.

§4-183. Appeal to superior court

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review by way of appeal under this chapter, provided, in case of conflict between this chapter and federal statutes or regulations relating to limitations of periods of time, procedures for filing appeals or jurisdiction or venue of any court or tribunal, such federal provisions shall prevail. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for such appeal shall be instituted by filing a petition in superior court for the judicial district of Hartford-New Britain or for the judicial district wherein the aggrieved person resides or if such person is not a resident of this state to the court for the judicial district of Hartford-New Britain within forty-five days after mailing of the notice of the final decision of the agency or, if a rehearing is requested, within forty-five days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record within thirty days after mailing of such notice or, if a rehearing is requested, thirty days after the decision thereon, except

that service upon an agency may be made by mailing a copy of the petition by registered or certified mail, postage prepaid, to the office of the commissioner of the agency or to the office of the attorney general in Hartford.

(c) The filing of the petition does not of itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within thirty days after the service of the petition, or within such further time as may be allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding appealed from, which shall include the agency's findings of fact and conclusions of law, separately stated. By stipulation of all parties to such appeal proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The appeal shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon all such appeals which are denied, costs may be taxed in favor of the prevailing party at the discretion of the court, but no costs shall be taxed against the state.

(i) In any case in which an aggrieved party claims that he cannot pay the costs of an appeal under this section and will thereby be deprived of a right to which he is entitled, he shall, within the time permitted for filing the appeal, file with the clerk of the court to which the appeal is to be taken an application for waiver of payment of such fees, costs and necessary expenses, including the requirements of bond, if any. The application shall conform to the requirements of section 28A of the Practice Book. After such hearing as the court determines is necessary, the court shall enter its judgment on the application, which judgment shall contain a statement of the facts the court has found, with its conclusions thereon. The filing of the application for the waiver shall toll the time limits for the filing of an appeal until such time as a judgment on such application is entered.

Sec. 30-6-A24. Conduct of permit premises

(d) No person shall be employed or otherwise used on permit premises while such a person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the

buttocks, vulva or genitals. No person on the permit premises over whom the permittee can reasonably exert control, shall be permitted to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person, nor shall any person or employee be permitted to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

(e) No "live" entertainment shall be permitted except in accordance with prior written permission of the division. No entertainment shall be performed on any bar. No entertainer, dancer, or other person shall perform acts of or acts which simulate: sexual intercourse, masterbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; the touching caressing or fondling of the breasts, buttocks, anus or genitals; the displaying of any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No permittee shall permit any person or entertainer to remain in or upon the permit premises who exposes to public view any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. Entertainers must perform in one location and entertainers may not mingle with the patrons. However, the prohibition contained in the last sentence may be waived by the division upon written request indicating the desirability and necessity for entertainers to mingle with the patrons.

STATEMENT OF THE CASE

Plaintiffs are both operators of cafe's possessing liquor permits issued by the Division of Liquor Control (hereinafter referred to as D.L.C.) and both were found by the D.L.C., in separate hearings to have violated a D.L.C. regulation which prohibits nude activity where liquor is served and both received a five day suspension of their permits. The decision to suspend the permits of the plaintiffs was made after a full hearing before the D.L.C. The plaintiffs

introduced evidence to show that when the regulation was promulgated the D.L.C. never considered any scientific data, studies or evidence of any nature which would provide the basis for the passage of the regulation. In fact, the D.L.C. concedes that it merely copied the statute in effect in the State of California which was the subject of the case *California v. LaRue*, 409 U.S. 109, 115 (1972), 34 L.Ed. 2d 343, 93 S. Ct. 390 (1972);

Both plaintiffs appealed to the Superior Court and their cases were consolidated. The D.L.C. moved to dismiss the appeals claiming lack of subject matter jurisdiction. The D.L.C. argued that the plaintiffs failed to bring the action within the two year deadline established by CGS §4-168 (c) which provides as follows:

> (c) No regulation adopted after January 1, 1972, is valid unless adopted in substantial compliance with this section. A proceeding to contest any regulation on the ground of noncompliance with the procedural requirements of this section shall be commenced within two years from the effective date of the regulation.

The court dismissed the motion finding that the plaintiffs brought this appeal pursuant to CGS §4-183 of the Connecticut General Statutes from a final decision of an Administrative Agency in a contested case after exhausting all administration remedies, and found that this was a statutory right of appeal which allowed the court to review claims of error in the agency proceedings including alleged violations of the constitution. (Opinion Ex. A Appendix)

Subsequent to this decision the pleadings were closed and the case was tried before a different Judge of the Superior Court of the State of Connecticut. On August 5, 1981 both appeals were dismissed by Judge Morelli in a written memorandum of decision relying on CGS §4-168 (c) that the Administrative Procedure Act requires any attack on any regulation to be brought within two years of the effective date of the regulation. (Opinion Ex. B Appendix)

The plaintiffs simultaneously filed a petition to the Supreme Court of the State of Connecticut for certification for review, and an appeal to the Appellate Session of the Superior Court. After July 1, 1981 CGS §51-197 (d) provides an absolute right of appeal to the Appellate Session from a decision of an Administrative Agency. The State of Connecticut Division of Liquor Control moved to dismiss the appeal in the Appellate Session claiming that in view of the fact that the case at bar was pending prior to July 1, 1981 the only review possible was by the Supreme Court of the State of Connecticut. On October 20, 1981 the motion to dismiss was granted dismissing the appeal. (Ex. C. Appendix).

On October 14, 1981 the Supreme Court denied the petition for certification and on November 3, 1981 the plaintiffs motion for reconsideration was denied. (Ex. D & E Appendix).

In conclusion the decision of the Superior Court Judge dismissing the appeal has never been subjected to review by any other court in the State of Connecticut.

REASONS FOR GRANTING THE WRIT

The Petitioners' challenge regulation §30-6-A24 (d) & (e) promulgated by the Connecticut Division of Liquor Control (hereinafter referred to as D.L.C.) and enforced against the Petitioners' more than two years after its effective date. The Petitioners' argue that said regulation is constitutionally defective and that the enforcement of said regulation violates their rights under the Fifth and Fourteenth Amendments to the U.S. Constitution. The Connecticut State Courts have issued a final ruling denying Petitioners' the right to challenge this D.L.C. Regulation, because the challenge was not brought within two years of the adoption of the regulation as required by C.G.S. §4-168 (c). Consequently, the Petitioners' are foreclosed from asserting their federal rights. The Petitioners' urge this Court to grant a writ of certiorari pursuant to Rule 17.1 (c).

A. A State May Not Refuse To Enforce And Protect Rights Guaranteed by The Constitution Of The United States.

It is clear that our national existence is premised upon the belief that in cases where state and federal laws conflict, federal law shall be followed. Article VI §2 of the United States Constitution states:

> This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby and anything in the Constitution or laws of any State to the contrary notwithstanding.

The clear language of this Constitutional provision was given further emphasis by Chief Justice Marshall. In his opinion in *McCulloch v. Maryland*, 4 Wheat 316, 426 (1819) Marshall wrote:

> The great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them.

This Court again emphasized the supremacy of federal law in its ruling in *Ex Parte Siebold* 100 U.S. 371, 394 (1879) when it held:

> "...It seems often to be overlooked that a national Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is... The true interest of the people of this country requires that both the national and State governments be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution State rights

> and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other."

Clearly, enforcement of the two year statute of limitations on raising a challenge to the validity of a regulation has, in this instance, had the undesirable effect of impairing the rights granted to Petitioners' by the Constitution.

B. The Supreme Court Has The Power To Review And Strike State Decisions Which Bar Litigation Of Federal Claims.

The court below interposed a procedural roadblock to judicial review thereby barring a full hearing, of the Petitioners' constitutional claims, on the merits. The result of the decision in effect has deprived the Petitioners' of the opportunity to obtain judicial review. Petitioners' are in the same position as a claimant who has actually received a full and final judgment upon the merits of his complaint. Petitioners' access to the courts has been barred by a judgment that Connecticut's interest in its procedure takes priority over the federal interest in enforcing a federal claim.

This Court should review Connecticut's assertion and decide whether Connecticut's procedure meets the requirements of due process and whether Connecticut's enforcement of the two year limitation comports with the requirements of the Supremacy Clause. The Court is clearly not bound by a state court's finding that the claim was barred.

> ...whether (a) federal question was sufficiently and properly raised in the State Courts is itself ultimately a federal question as to which (the) Court is not bound by the decision of the State Courts.

Street v. New York, 394 U.S. 576, 583 (1969), 22 L.Ed. 2nd 572, 895, Ct. 1354 (1969).

> "Constitution which guarantees rights and immunities to the citizen, like-wise insures to him the privilege of having the rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State Court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. See, *Ward v. Love City*, 253 US 12, 22; *Enter-Irrigation District v. Canal Co.*, 243 US 157, 164; *Foxriver Paper Co. v. RR Commissioner*, 274 US 651, *Lawrence v. State Tax Commissioner of Mississippi*, 286 US 276 (1932).

In fact, this Court has reviewed, and struck down, state procedural bars to the litigation of Constitutional issues on many occasions. In his opinion in *Davis v. Wechsler*, 263 US 22, 24 (1923) 68 L.d. 143, 44 S. Ct. 13 (1923) Justice Holmes stated:

> "whatever springes the State may set for those who are endeavoring to assert right that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

In *Lawrence, supra*, 282 the Court again opined that a failure to hear a federal claim which was based upon nonsubstantial procedural grounds was as objectionable as an erroneous ruling:

> "...his constitutional rights are denied as well by the refusal by the State court to decide the question as by an erroneous decision of it, see *Green v. Louisville and Interurban Rail Co.*, 244 US 499, 508, 512 *et. seq.; Smith v. Cahoon*, 283 US 553, 564 for in either case the inequality complained of is left disturbed by the State Court whose

jurisdiction to remove it was rightly invoked."

In *Brown v. Western Railways of Alabama*, 338 US 294, 298 (1949), 94 L.Ed. 100, 70 S. Ct. 105 (1949) the Court announced that, "strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws".

This Court's opposition to state procedures which restrict federal rights has not diminished with time. In *Henry v. Mississippi*, 379 US 443, 447-8 (1965), 13 L.Ed. 2nd 408, 85 S. Ct. 564 (1965), the Court stated:

> "...a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural rule ought not be permitted to bear vindication of important federal rights".

Although *Henry* dealt with criminal procedures, the logic and language of the decision can and should be applied to all cases where the Court finds a State has barred litigation of federal claims for unsubstantial reasons.

C. Connecticut's Two Year Limitation On Challenges To Rule-Making Proceedings Applies to Assertions Of Non-Compliance With The Provisions Of The Administrative Procedure Act And Not To A Challenge Of The Constitutional Validity Of The Regulation.

The regulation which Petitioners' challenge was adopted more than two years prior to the date it was enforced against them. Until it was actually applied to them, they suffered no injury in fact; and had no reason, to challenge, the basis of the regulation. Once the regulation was enforced, the Petitioners' were barred from challenging the Constitutional validity of the regulation. Their position was similar to the plaintiff in *Brinkeroff - Faris Trust & Savings Co. v. Hill*, 281

U.S. 673, 379 (1930):

> "State Court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property (without due process of law)".

Since the Court granted relief to the plaintiff in *Brinkerhoff* it should do the same here.

D. Does The Superior Court Decision That The Petitioners' Argument Challenging The Constitutional Validity Of Regulation Section 30-6-A24 (d) and (e) Amounted "To A Procedural Challenge Couched In Constitutional Argument", Preclude The Court From Reviewing The Specific Constitutional Defects.

The petitioners aggrieved by a ruling of the D.L.C. challenged the basis of the regulations pursuant to C.G.S. §4-183 of the Connecticut General Statutes. The statute, which is Connecticut's codification of Section 15 of the Uniform Administrative Procedure Act, permits the aggrieved party a direct appeal to the Superior Court.

The challenge under C.G.S. §4-183 (g) is that the basis of the "findings, inferences, conclusions, or decisions" of the D.L.C. is (1) "in violation of constitutional... provisions" (C.G.S. §4-183 (g) (1)); (2) "in excess of the statutory authority of the agency" (C.G.S. §4-183 (g) (2)); and (3) "arbitrary or capricious" amounting to an "unwarranted exercise of discretion" (C.G.S. §4-183 (g) (6)).

The court, however, imposed the provisions of C.G.S. §4-168 (c) as the sole method of review afforded the petitioners. The court, in its unpublished opinion, asserted, in pertinent part, as follows:

> "Plaintiffs' claims as to insufficient fact-finding and inadequate statement of purpose amount to a procedural challenge couched in constitutional argument more appropriately concerned with the application of the statute rather than its promulgation. If the plaintiffs are claiming that defendants failed to comply with Administrative Procedure Act requirements, the Division's decision to bar this line of argument to C.G.S. Section 4-168 (c) was correct." P. 3-4. Morelli opinion.

Nowhere in the petitioners' briefs was it asserted that the challenge was to the promulgation of the regulation. In fact, C.G.S. §4-168 (c) was first raised by the defendant State of Connecticut in a motion to dismiss which was rejected by the Superior Court on June 5, 1980 by Aspell, J. In that opinion, the court held that "plaintiffs (petitioners) are not bringing this appeal pursuant to Section 4-168. They are appealling pursuant to Section 4-183...from a final decision of an agency in a contested case. This is a statutory right of appeal, which allows the court to review claims of error in the agency proceedings, including alleged violations of the constitution" Memorandum of Decision Ex. C. Appendix. Petitioners have not been afforded that opportunity in the state courts.

In other words, the reviewing court has applied a standard which establishes a principle without foundation in statute or relevant federal and state case law: That if a regulation is promulgated and no challenge is forthcoming within the time limitations contained in C.G.S. §4-168 (c) then the basis of the regulation and all constitutional infirmities contained therein shall be immune from any subsequent challenge when the regulation is applied for purposes of enforcement.

There is no basis for such a proposition and, thus, the foundation of the decision of the reviewing court is defective.

First of all, C.G.S. §4-168 (c) clearly establishes a standard to "contest any regulation on the ground of noncompliance with the

procedural requirements" of the Administrative Procedure Act. Thus, the two year statute of limitations is tailored to specific enumerated safeguards contained in Chapter 54 of the Connecticut General Statutes. To repeat, the challenge by petitioners was not a challenge to the procedural compliance with the Administrative Procedure Act but rather a direct challenge to the constitutional basis of the regulations.

In Connecticut, it has been held that the Uniform Administrative Procedure Act "was not intended to serve as the sole and exclusive remedy of a person aggrieved by a decision of the state administrative agency or official", *McAuliffe v. Carlson*, 303 A.2d 746, 30 Conn. Sup. 118, 122 (1972); see also *Gibbons Co., Inc. v. Archie*, 548 P.2d 1366 (1976) where the Supreme Court of the State of Nevada claimed that the Administrative Procedure Act established "minimum procedural requirements governing the regulation-making process of state agencies." *Id.* at 1367

Further, the purpose of judicial review of an administrative agency's decision is to "keep the agency within its statutory grant of authority and thus guard the rights of the parties which are guaranteed by the constitution and statutes." *Ragano v. Civil Service Commission*, 400 N.E.2d 97, 100, 80 Ill. App.3d 523, 35 Ill. Des. 960 (1980).

Furthermore, the Commissioner's comment on Section 15 (g), the analogue to C.G.S. §4-183 (g), asserts the following, in pertinent part:

> "So far as necessary to decision and where presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or application of the terms of any agency actions." Uniform Laws Annotated, Vol. 14, West Publication (1980). "Civil Procedure and Remedial Laws".

Second, this Court has developed a standard of review, evolving over the years, for judicial conduct in administrative cases. In *Pacific*

States Box & Basket Co. v. White, 296 U.S. 176, 186, 80 L.Ed. 138, 56 S. Ct. 159 (1935) the Court held that "where the regulation is within the scope of authority legally delegated, the presumption of existence of facts justifying its specific exercise" is applied. That standard was followed for several decades. See *American T & T Co. v. United States*, 299 U.S. 232, 236-237, 81 L.Ed. 142, 57 S. Ct. 170 (1936); see also *American Trucking Associations v. United States*, 344 U.S. 298, 314, 97 L.Ed. 337, 73 S. Ct. 307 (1953).

To a large extent the fundamental law governing the scope of review of the basis of a regulation has not shifted substantially. In *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 32 L.Ed. 2nd, 453, 92 S. Ct. 1941 (1972), this Court said that "we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter was rationally supported." *Id* at 749. This standard has been adopted by state courts as well. In *Somerich v. New York City Health & Hospital Corp.*, 416 N.Y. S.2d 455, 98 Misc. 2d 736 (1978) the court held, in pertinent part, as follows:

> "Where a rule or regulation...is challenged, the test is whether the rule or regulation has a rational basis...There is a presumption that rules or regulations promulgated by a public agency are reasonable and just and the burden of establishing unreasonableness is on the person challenging the rule or regulation." *Id.* at 456.

The petitioners seek the opportunity to carry the burden denied by the Superior Court, the reviewing tribunal in the instant case, which established an artificial impediment to a proper administrative challenge.

The standard of review the petitioners seek to apply is the "substantial evidence" rule as developed by this Court. In *United States v. Midwest Video Corp.*, 406 U.S. 649, 673, 32 L.Ed.2d 390, 92 S. Ct. 1860 (1972) this Court adopted a two-pronged standard of analysis pertinent to judicial review of the validity of a regulation. First, the

traditional issue of whether the rule is within the agency's statutory authority (which petitioners do not challenge); and, second, "whether the regulation is supported by substantial evidence that it will promote the public interest", *Id.* at 673 (as indicated in Section E. *infra*, petitioners argue that no evidence exists upon which such decision could be rendered.) See also *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620, 16 L.Ed. 2d 131, 86 S. Ct. 1018 (1966).

In *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 648 (CADC 1973) Judge Bazelon articulated the role of judicial review, entirely absent in the instant case:

> "...The Court's proper role is to see to it that the agency provides 'a framework for principled decision-making'... But in cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process which assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public." 478 F.2d at 651-52.

The cursory review by the Superior Court utilized in the instant case subverts the normal indicias of judicial review of administrative decisions and regulations so as to cry out for the exercise of the Court's power of supervision pursuant to Rule 17.1 (c). Petitioners urge this Court to apply the proper standard of review in the instant case.

E. **Regulations Section 30-6-A24 (d) And (e) Of the Division of Liquor Control Were Promulgated In The Absence Of Any Evidence, Reports Or Verifiable Statistical Data Which Would Establish A Reasonable Basis Of Said Regulations Under The Due Process Clause Of The Fifth And Fourteenth Amendments Of The U.S. Constitution.**

The record in the instant case demonstrates that the D.L.C. did not rely on any tests, reports, surveys, hearings, or witnesses,

prior to the promulgation of Regulation 30-6-A24 (d) and (e). The D.L.C.'s files contained no such information, and the testimony of both the Executive Secretary and the Chief Inspector corroborated the absence of any such information. In short, the Regulation was promulgated in accord with the whims or disposition of the Commissioners of the D.L.C.. Although there was no challenge on grounds of "noncompliance with procedural requirements" of the Administrative Procedure Act, see C.G.S. §4-168 (c), the regulation should fall on the basis of constitutional infirmities under the Fifth and Fourteenth Amendments as well as standards of administrative review.

The courts have generally conferred broad regulatory power to the states in the province of intoxicating liquor on the basis of the Twenty-First Amendment to the U.S. Constitution. However, contrary to the unbridled proscriptions of the Superior Court the power to regulate in the area of liquor control is not absolute. *California v. LaRue,* 409 U.S. 109, 115, 34 L.Ed. 2d. 342, 94 S. Ct. 390 (1972); see also, *Craig v. Boren,* 429 U.S. 190, 204-205 50 L.Ed. 2d. 397, 97 S. Ct. 451 (1976).

For example, that power does not release the state from the basic requirement that: (1) the objective of the Regulation be constitutionally permissible and (2) that the means selected be rationally related to the end to be achieved. *Inturri v. Healy,* 426 F. Supp. 543, 547 (1977); see also *Women's Liberation Union of Rhode Island v. Israel,* 512 F.2d 106, 108, (1st Cir. 1975); see also *Richter v. Department of Alcoholic Beverage Control,* 559 F.2d 1168, 1170 (9th Cir. 1977).

In the case of *California v. LaRue*, 409 U.S. 119, *supra,* this Court held that the expansive power to control the sale of liquor granted to the states by the Twenty-First Amendment established a presumption in favor of the validity of state regulation to the extent that the regulation was reasonable and rationally related to the furtherance of legitimate state interests. In *LaRue*, this Court confined its ruling to the statute on its face and reserved the question of whether future

concrete applications of similar rules would be constitutional. *Id.* at 119, footnote 5. Petitioners urge that the instant case is the concrete example the Court alluded to in *LaRue*.

However, essential to the *LaRue* decision is one fact, absent in the instant case: That the regulations in question were based upon *evidence*, substantial in scope, presented to the California Department of Alcoholic Beverage Control. *Id.* at 110, 115. The critical distinction with the instant case is that the Liquor Control Commission, in promulgating the regulation in question, did not consider one shred of evidence.[1]

The instant case is also to be distinguished from this Court's holding in *New York State Liquor Authority v. Bellanca*, 49 U.S.L.W. 3950, 41 CCH S. Ct. Bull, B3689 (1981) in light of the fact that a statute representing the judgment of the "elected representatives of the State of New York", *Id.* at 3692, was involved; whereas in the instant case, we are reviewing the administrative regulatory process.

An administrative agency is not free to exercise its authority with reckless abandon and is likewise not free to exercise its authority to pursue any and all ends within the affirmative reach of state authority. The open-ended discretion to choose alternatives is the "essence of legislative power; it is the power which the legislature possesses but its agents lack". *American Constitutional Law*, Tribe p. 285.

Furthermore, although an agency may rely on administrative convenience, *Hampton v. Mow Sun Wong*, 426, U.S. 88, 115 48 L.Ed.

---

[1] In the *Richter* case, *supra*, which interpreted the same California regulation considered in *LaRue*, the Ninth Circuit underscored the significance of the evidence considered by the Department as demonstrating the need and establishing the criteria for the regulation. Thus, the Supreme Court and the Ninth Circuit both emphasized the fact that extensive hearings were conducted "prior to the promulgation of the rules", clearly demonstrating the need for prophylactic action. 559 F.2d at 1172.

2d 495, 96 S. Ct. 1895 (1976), and an agency, in legislative rule-making, may reason from the particular to the general, *Assigned Car Cases*, 274 U.S. 564, 583 71 L.Ed. 1204, 47 S. Ct. 727 (1927), there must be a rational basis for the agency's conclusions and such basis must be embodied in the regulation.

The D.L.C. declares by regulation the proposition that bars which feature "go-go" dancers are peculiarly subjected to "unlawful and disorderly conduct", in contrast to bars that do not feature such dancing. However, the Division offered no evidence whatsoever that such conduct is especially prevalent in these bars as compared to any other class of bars; or that women, more than men, need protection when violence erupts in their presence; or that the combined presence of naked dancers and alcohol subjects patrons or anyone else to any particular harm.

On this basis, the D.L.C. could ban television football broadcasts in bars on the mere assertion that the combined presence of alcoholic liquor and football would lead to violent confrontation.

The D.L.C. has failed to abide by a standard clearly enunciated in *California v. LaRue, supra,* and, therefore the Regulation fails to comport with fundamental constitutional requirements. Therefore, the scheme established by the Regulation is irrational, having neither a factual basis nor relation to the end to be achieved. Even assuming that the D.L.C. was engaged in a valid regulatory purpose, the record is abundantly clear that there is still lacking the evidence or demonstration that the means utilized were either rational or, in fact, necessary.

The Superior Court, then, in fashioning an artificial impediment to a review of the reasonable basis of the regulation, relied upon a standard of review which has been implicitly overruled by this Court so as to call for an exercise of the Court's power of review pursuant to Rule 17.1 (c) of the Rules of this Court.

F. **The Division Of Liquor Control Abused Its Discretion By Failing To Establish An Ascertainable Standard, Rationale, Purpose, Or Finding Of Fact Upon Which It Based Section 30-6-A24 (d) And (e), Thereby Violating The Due Process Requirements Of The Fifth And Fourteenth Amendments Of The United States Constitution.**

In the American federal system, government functionaries are entitled to exercise officially only such powers as conferred on them, expressly or impliedly, by positive law. *Social Security Board v. Nierotko,* 327 U.S. 358 90 L.Ed. 718, 66 S. Ct. 637 (1946). The D.L.C. has been delegated broad powers by the General Assembly to carry out the regulatory responsibilities contained in the Liquor Control Act, §30-1 *et seq.,* C.G.S.. In the instant case, the D.L.C. promulgated Regulation, Section 30-6-A24 (d) and (e) clarifying its enforcement powers relative to the statutory proscription contained in C.G.S. §30-46 (a) (4).[2]

The D.L.C., in promulgating said regulation, abused its discretion inasmuch as the Commissioners failed to establish an ascertainable standard, rationale, purpose, or finding of fact upon which to base the regulation. The reviewing court, in turn, failed to scrutinize the basis of the regulation by imposing an artificial statutory impediment to said review.

The D.L.C. is not immune to judicially imposed limitations on its regulatory powers. In *Murphy v. Bergen*, 118 Conn. 249 171 At. 433 (1934), the Supreme Court of Errors held that a regulation adopted by the D.L.C., in effect, refusing to issue any druggist permits, was "beyond its power". *Id.* at 262.[3] Thus, not unlike other administrative agencies the exercise of the D.L.C.'s powers are subject to review

---

[2]Section 30-46 (a) (4) entitled, "Discretionary Refusal to Permit" reads, in pertinent part, as follows: "(a) The Commission may,...refuse to grant permits for the sale of alcoholic liquor if it has reasonable cause to believe:...(4) that the place has been conducted as a lewd or disorderly establishment..."

by the courts; and, if it finds that the D.L.C. "acted arbitrarily, unreasonably in abuse of its power or illegally, its action will be set aside." *Loglisci v. Liquor Control Commission*, 123 Conn. 31, 36 192 At. 260 (1937); see also *Dadisko v. Liquor Control Commission*, 150 Conn. 422, 426 190 A.2d 490 (1963); see also *Boncal v. Liquor Control Commission*, 148 Conn. 648, 650 173 A.2d 593 (1961).

Furthermore, an administrative agency, in making rules and regulations, must act: (1) within its statutory authority; (2) within constitutional limitations; and (3) in a lawful and reasonable manner. *Page v. Welfare Commissioner*, 170 Conn. 258, 262 365 A.2d 1118 (1976); see also *Amarone v. Brennan*, 126 Conn. 451, 454 11 A.2d 850 (1940); see also *Loglisci, supra*, at 37.

The power conferred to issue regulations for carrying a statute into effect must be exercised within the scope of the power delegated: "confined to details for regulating the mode of proceeding to carry into effect the law as it has been enacted, and it cannot be extended to amending or adding to the requirements of the statute itself". *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 79 L.Ed. 446, 55 S. Ct. 241 (1935); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 79 L.Ed. 1570, 55 S. Ct. 837 (1935). This Court has clearly and repeatedly put to rest a theory of unbridled administrative discretion. Petitioners seek a proper review of the instant case in that context.

It is also recognized in Connecticut that the validity of a regulation will be upheld if the courts find reasonable justification in serving a generally recognized ground for the exercise of the power in promulgating a regulation. *Murphy, Inc. v. Town of Westport*, 131 Conn. 292 40 A.2d. 177 (1944).

---

[3]The clear legislative intent of the Liquor Control Act, Gen. Sta. Cum. Supp. 1933, §6696, *et seq.*, confined the power of the Liquor Control Commission to the determination of a case-by-case basis "in the exercise of a *proper discretion*" whether the permit should be issued. *Murphy*, at 261 (emphasis added).

The cases interpreting the discretionary powers of the D.L.C. have agreed, in general, upon the proposition that all actions must be determined on the *basis of fact*. See *Loglisci, supra*, at 38 (emphasis added). This Court has held that "when the proper exercise of the powers of an administrative agency is dependent upon the *determination of fact*, the findings and conclusions of the agency are usually presumed to be correct on judicial review". *Public Clearing House v. Coyne*, 194 U.S. 497 48 L.Ed. 1092 24 S. Ct. 789 (1904); see also *Sutherland Statutory Construction*, Sands Ed., 4th Ed. (1975), Vol. 3, §65.05, p. 174 (emphasis added).

A review of the record in the instant case shows that a factual basis for the "findings and conclusions" of the Divisions is non-existent (Transcript of hearing before D.L.C. Dec. 20, 1979, Ex. F Appendix A.15, T. 24-25, testimony of Executive Secretary, Charles Kasmer; see also T. 31-32, testimony of Chief Inspector Thomas Poplawski.) Due process requires that there be a legitimate factual basis for promulgating a regulation intended to serve what may actually be a legitimate interest. *Hampton v. Mow Sun Wong*, 426 U.S. at 103 (1975).

The D.L.C. has acted in a vacuum, devoid of fact and surrounded by mere conjecture; in such an environment the principle of administrative convenience is not available to save the regulation in question. In the *Hampton* case, *supra*, the D.L.C., like the Civil Service Commission and all other administrative agencies, has the obligation to perform its responsibilities within the scope of its authority, and must fortify that authority with a diligent and appropriate recitation of reasons identifying the purpose and scope of the regulation. *Id.* at 103.

Furthermore, the regulation in question was transmitted for legislative review to the Regulation Review Committee of the General Assembly, pursuant to C.G.S. §4-170. Inasmuch as the Committee failed to act affirmatively on the proposed regulation, it was, in essence, rendered effective by default. This mode of promulgation

should, accordingly, be afforded a "minimum of weight" when scrutinized by the courts.

The regulation before us in the instant case directly affects the employment opportunity of dancers by restricting lawful activity and by establishing a discriminatory gender-based classification, both without basis. The Fifth Amendment protects against a deprivation of the right to work for a living without due process of law; this regulation strikes at the very essence of the personal freedom and opportunity that the Amendment was designed to secure.

The Fourteenth Amendment, likewise, prohibits any state from depriving any person of life, liberty or property without due process of law; and guarantees any person within its jurisdiction the equal protection of the law.

The effect of the regulation is to deny both the permittee and the dancers the opportunity to earn a livelihood without a clear statement of purpose or basis.[4]

It is also necessary for the state to show a compelling interest upon which to base this particular regulation. Such state interest would be extremely difficult to establish, in light of the lack of factual evidence relating to the conclusion reached by the D.L.C.. *Salem Inn, Inc. v. Frank,* 522 F.2d, 1045 (1975).[5]

---

[4]It is interesting to note and compare other Connecticut administrative agencies' handling of "statements of purpose". For example, see Connecticut Law Journal, anuary 22, 1980: Department of Consumer Protection, "This Amendment would provide additional 'lead time in which to process candidates' applications." Also see, in the same issue, Commission on Hospitals and Health Care. Contrast this to the statement of purpose published in the Connecticut Law Journal, December 14, 1976, by the Liquor Control Commission: "to amend (section 30-6-A24) the existing regulation concerning the conduct of permit premises and more specifically outline and define limitations pertaining to live entertainment within permit permises.")

In light of the state court's refusal to review the constitutionality of the regulation in the instant case, petitioners urge this Court to exercise the power of supervision pursuant to §17.1 (c) of the rules of the Court.

5. **The Twenty-First Amendment Of The United States Constitution Does Not Empower A State To Promulgate Regulations, Where Basic Rights Are At Issue, Superceding The Remaining Provisions Of The Constitution.**

We readily accept the proposition that the Twenty-First Amendment confers upon the state "something more than the normal state authority over public health, welfare and morals". *California v. LaRue*, 409 U.S. at 115 *supra*. However, that proposition has not been construed to suggest an unrestrained source of power to the respective state regulatory authorities.

In fact, this Court, in *LaRue*, announced with an unmistakable degree of clarity that the existence of broad Twenty-First Amendment powers do not supersede "all other provisions of the U.S. Constitution in the area of liquor regulations". *Id.* at 115.[6] This point is reiterated in many Twenty-First Amendment cases applicable to the instant case. *Craig v. Boren*, 429, U.S. at 204-205; see also *Women's Liberation Union of Rhode Island v. Israel*, 512 F.2d 106, 108 (1st Cir. 1972); see also *Inturri v. Healy*, 426 F.Supp. 543, 547 (1977).

---

[5]The Court, in *Salem Inn, Inc. v. Frank*, enunciated the following proposition, which has relevance in this case: "However much topless dancing may be regarded by some to be in the teeth of good taste, it is, on the record here, a harmless form of diversion or entertainment by way of communication from one human being to others. That interchange of communication is subject to constitutional protection so long as some legitimate interest of the state (or community) or others is not infringed upon." It is our deep conviction that no such evidence or, for that matter, any evidence whatsoever was offered to substantiate that there was a legitimate interest of the State, the community or any private party.

In the instant case, we submit that the substantial property and propriety rights of the petitioners are in serious jeopardy; and that they are subjected to substantial fine or revocation of their permit. Further, that the means chosen by the regulation in question are not rationally related to the end to be achieved, and that the D.L.C. has abridged due process standards by abuse of administrative discretion. These are substantial rights which cannot be relegated to oblivion by the broad reach of the Twenty-First Amendment. No court has held, to date, that the Twenty-First Amendment is so expansive as to substitute the caprice of an administrative agency for the protections of the Constitution and the Bill of Rights.[7]

This Court should exercise its power of review pursuant to Rule 17.1 (c) of the Rules of this Court.

CONCLUSION

The Petitioners' have complied with the requirements set forth in *Memphis Natural Gas Co. v. Beeler,* 315 US 649, 651 (1942). They have demonstrated that the federal questions were properly raised in the lower courts and that the Supreme Court has jurisdiction.

---

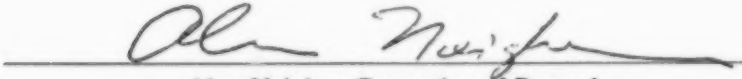
[6]In fact, footnote 5 of *California v. La Rue* underscores this point by restricting the holding to the statute on its face. We quote, in pertinent part, the following passage from that footnote: "Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in *Seagram & Sons v. Hostetter,* 384 U.S. 35, 52 (1966), is equally at point here: 'Although it is possible that specific future applications of (the statute) may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid.'"

[7]"Neither the test nor the history of the Twenty-First Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale of use of liquor is concerned." P. Brest, Processes of Constitutional Decision-Making, Cases and Materials, 258 (1975).

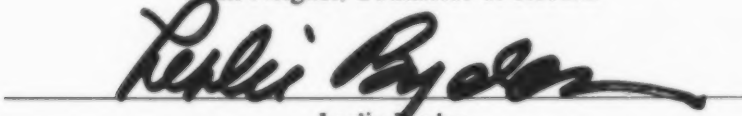
The State of Connecticut has failed to assert any substantial reasons which would justify its attempt to restrict the ability to challenge state regulations which infringe upon federal rights.

Petitioners' ask this Court to exercise its power to review Connecticut's decision in this matter and issue a writ of certiorari.

Respectfully submitted,



Alan Neigher, Counselor of Record



Leslie Byelas

Steven Mednick

1804 Post Road East
Westport, Conn. 06880
Tel. (203) 259-0599

Attorneys for Petitioners
Paul J. Cianci Et Al &
Victor R. Dydyn Et Al

Date

Appendix

No.

In The

Supreme Court of the United States

October Term, 1981

Paul J. Cianci, Et Al,

Petitioner,

v.

Division of Liquor Control
Department of Business Regulation,

Respondent.

and

Victor R. Dydyn, Et Al,

Petitioner,

v.

Division of Liquor Control
Department of Business Regulation,

Respondent.

APPENDIX

INDEX TO APPENDIX

		Page
A.	Order by the Appellate Session of the Superior Court for the Judicial District of Hartford.	A.2
B.	Memorandum of Decision, Superior Court, Hartford Judicial District, August 5, 1981 (Morelli, J.)	A.3
C.	Memorandum of Decision, Superior Court, Hartford Judicial District, June 5, 1980 (Aspell, J.)	A.12
D.	Order of Supreme Court denying petition for certification, October 14, 1981.	A.14
E.	Order of Supreme Court denying Motion for Reconsideration, November 3, 1981.	A.15
F.	Transcript of Hearing Before D.L.C. December 20, 1979	A.16

NO. A.S. 1188
Paul J. Ciocci et al
v.
Division of Liquor Control
Department of Business Regulation
Victor R. Dydyn et al
v.
Division of Liquor Control
Department of Business Regulation

APPELLATE SESSION OF
SUPERIOR COURT
HARTFORD COUNTY
October 20, 1981

ORDER

The motion of the defendant appellee to dismiss the appeal of the plaintiffs from the Superior Court for the Judicial District of Hartford having been heard by the Court, it is hereby

ORDERED by the Appellate Session of the Superior Court, that said motion be and the same is hereby granted.

By the Court

Paul Shea
Presiding Judge

Counsel notified of order 10.21.81
Trial court judge and Trial court clerk notified of order 10.21.81

RECEIVED
OCT 20 1981
LESLIE DYELAS

EXHIBIT A

DOCKET NO. 252783

PAUL J. CIANCI, ET AL : SUPERIOR COURT

V.

DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION

AND : HARTFORD JUDICIAL DISTRICT

DOCKET NO. 244300

VICTOR R. DYDYN, ET AL

V.

DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION : AUGUST 5, 1981

MEMORANDUM OF DECISION

These appeals are taken pursuant to C.G.S. 4-183(f) challenging the constitutionality of section 30-6-24(d) and (e) of the Division of Liquor Control Regulations, Department of Business Regulation, which, prohibit nude activity.

The pertinent provisions of said regulations are as follows:

> "(d) No person shall be employed or otherwise used on permit premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No person on the permit premises over whom the permittee can reasonably exert control, shall be permitted to touch, caress or fondle the

EXHIBIT B

> breasts, buttocks, anus, or genitals of any other person, nor shall any person or employee be permitted to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.
>
> "(e) No 'live' entertainment shall be permitted except in accordance with prior written permission of the division. No entertainment shall be performed on any bar. No entertainer, dancer, or other person shall perform acts of or acts which simulate: sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law; the touching, caressing or fondling of the breasts, buttocks, anus or genitals; the displaying of any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. No permittee shall permit any person or entertainer to remain in or upon the permit premises who exposes to public view any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals. Entertainers must perform in one location and entertainers may not mingle with the patrons. However, the prohibition contained in the last sentence may be waived by the division upon written request indicating the desirability and necessity for entertainers to mingle with the patrons."

Plaintiffs claim a deprivation of due process and equal protection through violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article First of the Constitution of the State of Connecticut, alleging that the regulations were improperly promulgated, have no rational basis, and constitute a gender-based classification.

The facts herein are not in dispute or at issue. The

above entitled matters are two consolidated administrative appeals from Division of Liquor Control decisions, each having essentially identical fact patterns. In each action, the holder of a liquor permit appeals from a five-day suspension of said permit for violations of the aforementioned regulations by female dancers.

Plaintiffs seek, inter alia, a reversal of the Division's decision, s stay of suspension, and a declaration that regulations 30-6-24 (d) and (e) are unconstitutional.

I. Promulgation

Plaintiffs' due process arguments as to the procedure used in the promulgation of the regulation constitute an appeal from rule-making, and as such, are inappropriate in this appeal from an adjudicatory hearing. Substantive claims as to the rationality of the regulation and its effect on plaintiffs are considered separately below and should not be confused with procedural claims.

Plaintiffs' claims as to insufficient fact-finding and inadequate statement of purpose amount to a procedural challenge couched in constitutional argument more appropriately concerned with the application of the statute rather than its promulgation. If plaintiffs are claiming that defendants failed

to comply with the Administrative Procedures Act requirements, the Division's decision to bar this line of argument pursuant to C.G.S. 4-168 (c) was correct. Subsection (c) mandates that actions claiming non-compliance with APA requirements be commenced within two years of the contested regulation's effective date. Since the regulations in question became effective on December 3, 1976 and plaintiff's challenge began on December 20, 1979, plaintiffs are precluded from pursuing this line of argument.

Assuming arguendo, that this argument was not precluded by statute, this court would find it unpersuasive. An agency or division thereof which is authorized to enact regulations possesses a large measure of discretion, and the burden of showing improper action rests on the party which so claims. Riley v. Board of Police Commissioners, 147 Conn. 113, 117 (1960). Likewise, the burden of proving unconstitutionality is on the plaintiff. Langs v. Harder, 165 Conn. 490, 502 (1973). Plaintiffs have failed to show that defendants did not comply with the requirements of the APA in the instant case. The evidence offered establishes compliance with the 1976 requirements of proper notice and hearing affording interested persons an opportunity to be heard. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519,

524 (1978), the Supreme Court ruled that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rule-making procedures." Regulations promulgated pursuant to the provisions of the APA are presumed to conform to due process standards. In the instant case, plaintiffs have failed to meet their burden to show otherwise.

II. The Twenty-first Amendment and Due Process

Plaintiffs further claim that the regulations have no rational basis and that therefore defendant's action was in excess of its authority and power.

It has long been established that the Twenty-first Amendment gives the states absolute power to totally prohibit the sale of liquor within its boundaries. Ziffin Inc. v. Reeves, 308 U.S. 132, 138 (1939). This broad power extends to the regulation of the circumstances and conditions under which liquor may be sold. California v. LaRue, 409 U.S. 109 (1972).

In California v. LaRue, the Supreme Court upheld the facial validity of the regulations after which Connecticut consciously patterned those at issue in the instant case.

In Inturri v. Healy, 426 F. Supp. 543 (1977),.these same Connecticut regulations were held to be rational and

therefore constitutional on their face pursuant to California v. LaRue, supra.

More recently, the Supreme Court directly addressed the question of whether a state has the power to prohibit topless dancing on premises licensed by that state to serve liquor. In New York State Liquor Authority v. Bellanca, ____ U.S. ____, No. 80-813, June 22, 1981, the court reversed a New York Court of Appeals decision affirming the unconstitutionality of a statute prohibiting liquor licensees from providing, inter alia, topless dancers for customers.[1]

The New York decision, on which plaintiffs place emphasis in oral argument, reasoned that the State had not demonstrated sufficient need for prohibiting nonobscene topless dancing, which could be considered a form of protected expression under the First Amendment. In reversing the Court of Appeals, the Supreme Court stated that "[t]he State's power

---

[1]The statute provided:
"No retail license for on premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof."

to bar the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."

The Court stressed that the statute represented a reasonable restriction imposed by officials ". . . to avoid disturbances associated with mixing alcohol and nude dancing", and that policy judgments concerning the desirability of such entertainment were for the state legislature, not the court, to make.

In the instant case, plaintiffs have failed to show that the challenged regulations are not rationally related to the furtherance of a legitimate state interest. The broad and absolute power granted by the Twenty-first Amendment confers a presumption of validity to a contested regulation, California v. LaRue, supra, at 118, which plaintiffs have not overcome.

III. Equal Protection

Plaintiffs claim that the regulations establish an unconstitutionally gender-based classification, both on their face and application.

Plaintiffs have not demonstrated how the regulations

are facially discriminatory. The language of the regulations refers to "persons" and "entertainers"; the only differentiating language refers to the "female breast" and "vulva", merely reflecting obvious anatomical differences between males and females.

Equal protection does not prevent legislative bodies from dealing differently with different classes of persons provided the action does not constitute invidious discrimination. See, C. & H. Enterprises, Inc. v. Commissioner of Motor Vehicles, 176 Conn. 11, 14 (1978). Identical treatment for all persons without consideration of differences in relevant circumstances is not demanded. Id. at 15.

When acting pursuant to regulations found constitutionally valid by the Supreme Court in New York State Liquor Authority v. Bellanca, supra, the Division of Liquor Control is empowered to draw reasonable distinctions concerning their application.

Plaintiffs' further assertion of discriminatory application is not supported by the evidence in the record.

Since the regulations are not found to be discriminatory on their face or by their application, defendant's claim as to plaintiffs lack of standing to raise such equal

protection arguments need not be considered. It would serve no useful purpose.

CONCLUSION

Viewing the record as a whole, this court finds no evidence that the Division acted arbitrarily, illegally, or so unreasonably as to constitute abuse of discretion. In the absence of such a finding relief will not be given. Torello v. Board of Zoning Appeals of New Haven, 127 Conn. 307 (1940); See, Brown v. Liquor Control Commission, 176 Conn. 428, 431 (1979).

Accordingly, the decisions of the Division are affirmed and the appeals are dismissed.

Joseph F. Morelli
Judge - Superior Court

RECEIVED
JUN 9 1980
LESLIE BYELAS

NO. 244300

VICTOR R. DYDYN, ET AL.	:	SUPERIOR COURT
VS.	:	JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD
LIQUOR CONTROL DIVISION	:	JUNE 5, 1980

MEMORANDUM OF DECISION
ON
MOTION TO DISMISS

This case is an administrative appeal from a decision of the Connecticut Division of Liquor Control suspending the plaintiff's liquor license for five days.

The defendant has filed a Motion to Dismiss claiming lack of subject matter jurisdiction. The Motion to Dismiss claims that the plaintiffs have failed to bring the action within the deadline established by § 4-168 of the Connecticut General

JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD

EXHIBIT C

Statutes and that the plaintiffs have no standing to raise the constitutional arguments presented.

The plaintiffs are not bringing this appeal pursuant to § 4-168. They are appealing pursuant to § 4-183 of the Connecticut General Statutes from a final decision of an agency in a contested case. This is a statutory right of appeal, which allows the court to review claims of error in the agency proceedings, including alleged violations of the constitution.

The subject matter jurisdiction of the court has been invoked pursuant to § 4-183 of the Connecticut General Statutes Rev.

The Motion to Dismiss is denied.

Aspell, J. J.
Aspell

NO. 252783

Paul J. Cianci : SUPREME COURT

vs.

Division of Liquor Control
Department of Business Regulation

NO. 244300 : STATE OF CONNECTICUT

Victor R. Dydyn, et al

vs.

Division of Liquor Control
Department of Business Regulation : OCTOBER 14,1981

ORDER DENYING CERTIFICATION

The plaintiffs having filed a petition for certification and the court having considered said petition finds that it should be denied.

Whereupon it is ordered that said petition be and it is hereby denied.

RECEIVED
OCT 17 1981
LESLIE BYELAS

By the Court

Donald H. Dowling
Chief Clerk

Notice
Leslie Byelas
Richard M. Sheridan, Assistant Attorney General
Robert J. Vacchelli, Assistant Attorney General
Gordon Alan Evans Associate
Steven G. Mednick
Clerk, Superior Court, Hart
October 14, 1981

EXHIBIT D

NO. 252783

PAUL J. CIANCI : SUPREME COURT

V.

DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION

NO. 244300 : STATE OF CONNECTICUT

VICTOR R. DYDYN, ET AL

V.

DIVISION OF LIQUOR CONTROL : NOVEMBER 3, 1981
DEPARTMENT OF BUSINESS REGULATION

ORDER

THE PLAINTIFFS' MOTION FOR RECONSIDERATION HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

Donald H. Darling
CHIEF CLERK

Notice: Leslie Byelas
Richard M. Sheridan, Asst. Atty. Gen.
Robert J. Vacchelli, Asst. Atty. Gen.
~~Gordon Alan Evans & Associates~~
Steven G. Mednick
~~Clerk, Hartford~~
~~November 5, 1981~~

EXHIBIT E

BY MR. BYELAS:

Q Now, did you bring with you the transcript of the March 29th, 1976 hearing at my request?

A Yes, sir.

MR. BYELAS: All right. Mark that as an exhibit.

COMMISSIONER SNYDER: Permittee 2.

(Permittee Exhibit 2: Transcript of the hearing of March 29, 1976.)

BY MR. BYELAS:

Q And pursuant to this subpoena did you bring with you the transcript of October 16th, 1979, that hearing?

A Yes.

MR. BYELAS: I introduce this as an exhibit.

COMMISSIONER SNYDER: Permittee 3.

(Permittee Exhibit 3: Transcript of the hearing of October 16, 1979.)

BY MR. BYELAS:

Q Now, did you make a diligent search to determine if any type of studies were made to determine what the effect of nude dancing had on patrons prior to the passage of this regulation? Did you search all the

records?

A To see if we had any surveys?

Q Studies.

A Yes.

Q And what do you find? Did you find any studies?

A No.

Q Did you find any kind of reports that might have been prepared prior to the promulgation of this regulation as to the effect nude dancing had on patrons?

A No.

Q Did you find any kind of data that might have been prepared on the effect of nude dancing on patrons prior to the passage of this regulation?

A No.

THE CHAIRMAN: Let me interject.

Prior to this there were regulations, existing regulations on Conduct on Permit Premises.

MR. BYELAS: Yes.

BY MR. BYELAS:

Q Showing you one of the matters or one of the type of documents that is contained in this folder, Exhibit 1, looking at this what is that written in red in the column of that document?

A The words, "What is the purpose," and a question

Q Have you had any recent investigations of cafes in the Bridgeport area?

A Yes, we have.

Q Now, did you bring with you any kinds of data to show the extent of public disorder where nude dancing takes place in licensed permit premises?

A No, I did not.

Q You did make a diligent search to see if you had any of that type of data, didn't you?

A Yes, I turned all my documents over to Mr. Kasmer for you to review.

Q Right, and you have no --

COMMISSIONER SNYDER: Excuse me, but do you mean formal studies and not any particular Permittee's file that may have had a violent incident that would have been caused by such behavior on the premises?

MR. BYELAS: I'm sorry. I didn't understand.

COMMISSIONER SNYDER: You don't mean any facility where there may have been disorderly conduct?

MR. BYELAS: No, a formal study that may have been made that would reach the conclusion that nude dancing creates brawls, per say, and I think the answer, if I am correct,

is that that does not exist, correct?

A No, sir.

BY MR. BYELAS:

Q There are no test studies or data of any kind to support that conclusion?

A No, sir.

COMMISSIONER SNYDER: In this Commission. We don't know if they exist anyplace else.

MR. BYELAS: In your office or any -- in his office that is all I am concerned with, yes.

BY MR. BYELAS:

Q How would you describe the type of men the female dancers attract to these cafes?

A I wouldn't know. I haven't been out in the field that often.

Q Well, have you ever observed this type of conduct?

A Yes.

Q And at the time of your observation, when would that have been in the last year or two or prior to that?

A This past summer.

Q And at that time you must have seen the people that were wherever you were. Can you describe them, to the best of your recollection?

A I would say it was the younger set, under twenty-five.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1454

In The

Supreme Court of the United States

OCTOBER TERM, 1981

PAUL J. CIANCI, ET AL.
Petitioner,
V.
DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION
Respondent.
AND

VICTOR R. DYDYN, ET AL.
Petitioner,
V.
DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Carl R. Ajello
Attorney General
Robert F. Vacchelli, Counsel of Record
Assistant Attorney General
Richard M. Sheridan
Assistant Attorney General
Russell Road, P.O. Box 11424
Newington, Connecticut 06111
(203) 566-7570
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether Petitioners can challenge the constitutionality of Section 4-168(c) of the Connecticut General Statutes, for the first time in the history of this litigation, in the Petition for Writ of Certiorari?

2. Assuming arguendo Petitioners can challenge the constitutionality of Section 4-168(c) of the Connecticut General Statutes, whether Petitioners are correct in representing that Section 4-168(c) was employed by the Connecticut courts to bar Petitioners from litigating the constitutionality of the Division of Liquor Control's nude conduct regulation, Reg. Secs. 30-6-A24(d) and (e)?

3. Whether the Division of Liquor Control considered any evidence prior to promulgating Reg. Secs. 30-6-A24(d) and (e)?

4. Whether the Division of Liquor Control abused its discretion when it promulgated Reg. Secs. 30-6-A24(d) and (e)?

5. Whether Connecticut can, as part of its liquor licensing program, ban topless dancing at liquor permit premises?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Additional Provisions Involved	1
Statement of the Case	3
Reasons for Denying the Writ	4
Argument	5
Conclusion	10
Appendix	1a

TABLE OF AUTHORITIES

Cases	Page
Adickes v. *Kress & Co.*, 398 U.S. 144, 147, n.2, 90 S.Ct. 1598, 26 L.Ed.2d. 142 (1970)	6
Barmat v. *Robertson,* 125 Ariz. 514, 611 P.2d. 101 (1980) app. dis., 449 U.S. 894, 101 S.Ct. 259, 66 L.Ed.2d. 124	9
Bundo v. *Michigan Liquor Control Commission,* 92 Mich. App. 20, 407 Mich. 900, 283 N.W. 2d. 852 (1979) app. dis., 50 U.S.L.W. 3243	9
California v. *LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d. 342 (1972)	8
California v. *Taylor,* 353 U.S. 553, 557, n.2, 77 S.Ct. 1037, 11 L.Ed.2d. 1034 (1957)	6
Doran v. *Salem Inn, Inc.*, 442 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d. 648 (1975)	9
Duignan v. *United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 989 (1927)	6
Gabriele v. *Town of Old Orchard Beach,* _____ Me. _____, 420 A.2d 252 (1980)	9
Inturri v. *Healy,* 429 F.Supp. 543, 547, (D. Conn., 1977)	8
Lawn v. *United States,* 355 U.S. 339, n.16, 78 S.Ct. 311, 2 L.Ed.2d. 321 (1958)	6
New York State Liquor Authority v. *Bellanca,* _____ U.S. _____, 101 S.Ct. 2599, 69 L.Ed. 2d. 357 (1981)	5,9

	Page
Tyrrel v. *District of Columbia,* 243 U.S. 1, 37, S.Ct. 361, 61 L.Ed. 557 (1917)	6
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.,* 445 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d. 460 (1978)	8
Statutes	
C.G.S. Sec. 4-166 et seq.	5
C.G.S. Sec. 4-168(c)	3,5,6,7
C.G.S. Sec. 4-183	3
C.G.S. Sec. 51-197b	4
C.G.S. Sec. 51-197d	4
Other Authorities	
Conn. Practice Book Sec. 3137	4
Conn. P.A. 80-471, Sec. 2	8
Liquor Reg. Sec. 30-6-A24(a)	8
Liquor Reg. Secs. 30-6-A24(d) and (e)	3,5,6, 7,8
Stern and Gressman, *Supreme Court Practice* (5th Ed.) Sec. 6.27 at p. 457	6
U.S. Constitution Amendment XXI	4,9

NO. 81-1454

In The

Supreme Court of the United States

OCTOBER TERM, 1981

PAUL J. CIANCI, ET AL.
Petitioner,
V.
DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION
Respondent.

AND

VICTOR R. DYDYN, ET AL.
Petitioner,
V.
DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ADDITIONAL PROVISIONS INVOLVED

In addition to the material reprinted by Petitioners, Respondent identifies the following additional provision of the law involved in this case:

Amendment XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of submission hereof to the States by the Congress.

Connecticut Practice Book Sec. 3137

Basis for Certification

Certification by the supreme court on petition is not a matter of right but of sound judicial discretion and will be allowed only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of the reasons which will be considered:

(1) Where the court below has decided a question of substance not theretofore determined by the supreme court or has decided it in a way probably not in accord with applicable decisions of the supreme court.

(2) Where the decision under review is in conflict with other decisions of the court below.

(3) Where the court below has so far departed from the accepted and usual course of judicial proceedings,

or so far sanctioned such a departure by any other court, as to call for an exercise of the supreme court's supervision.

(4) Where a question of great public importance is involved.

(5) With respect only to appeals from the appellate session, where the judges of the appellate panel are divided in their decision or, though concurring in the result, are unable to agree upon a common ground of decision.

STATEMENT OF THE CASE

These cases are consolidated administrative appeals challenging the validity of Sections 30-6-A24(d) and (e) of the regulations of the Respondent, Connecticut Division of Liquor Control. These regulations, reprinted at page 4 and 5 of Petitioners' brief, prohibit explicitly described nude activity at liquor permit premises. They were promulgated following a rule-making hearing held on March 29, 1976. Both cases have virtually identical fact patterns. In each action the holder of a Connecticut liquor permit appeals from a five-day suspension of said permit for violations of said regulations, in particular, involving female dancers who performed topless.

The appeals were brought to the Connecticut Superior Court pursuant to C.G.S. Sec. 4-183. See Complaints, Respondent's Appendix A and B at p. 1a and 4a. The *Dydyn* Complaint was filed first and revealed that Petitioner emphasized defects in the procedure used in promulgating the regulation, i.e. failure to conduct studies prior to rule-making, failure to draft and append an adequate statement of purpose to the text. Consequently, Respondent moved to dismiss the appeal as untimely under C.G.S. Sec. 4-168(c) (Reprinted in Petition) which section bars all procedural challenges brought more than two years after the effective date of the regulation. The motion was denied. See Petitioners' Exhibit C at p. A12. No such motion was filed in

the *Cianci* case even though it raised identical issues, because it was filed subsequent to the above noted decision. The appeals were then argued on their merits and Judge Joseph F. Morelli issued his decision on August 5, 1981, treating all issues raised by Petitioners in their Complaint. See Petitioners' Exhibit B at p. A3.

Petitioners appealed to the Appellate Session of the Superior Court under C.G.S. Sec. 51-197d and simultaneously petitioned the Connecticut Supreme Court for Certification to Appeal under C.G.S. Sec. 51-197b. Respondent's Appendix C and D at p. 8a and 10a. The dual appeal was initiated as a result of some confusion on Petitioners' part as to which route was required by statute. On October 14, 1981 the Supreme Court exercised jurisdiction and, in its sound judicial discretion and under the guidelines of Practice Book Sec. 3137, determined that the cases did not merit further adjudication. Petitioners' Exhibit D at p. A14. (Practice Book Sec. reprinted above). On October 20, 1981, the Appellate Session, aware of the Supreme Court's decision, similarly dismissed the appeal in response to a motion by Respondent indicating that the statutes clearly mandated that appeals such as the one in question could only be brought to the Supreme Court on Petition for Certification. See Petitioners' Appendix A at p. A2. Petitioners moved for reconsideration in the Supreme Court, Respondent's Appendix E at p. 12a. The Supreme Court, aware of all of the above, denied reconsideration on November 3, 1981. Petitioner's Exhibit E at p. A15.

In conclusion, all of the issues raised by Petitioners were litigated and decided on their merits at the trial court level in the Connecticut court system. Petitioners then exercised all the further appellate rights available to them, and even attempted some which clearly were not.

REASONS FOR DENYING THE WRIT

This case deserves absolutely no attention from this court. The law is perfectly clear that a state can, as part of its liquor licensing program, and as an exercise of its Twenty-first Amend-

ment powers, ban topless dancing at permit premises under federal law. Indeed a recent case decided by this court, which raised nearly identical due process challenges, was decided in a per curium decision. See *New York State Liquor Authority* v. *Bellanca* _____ U.S. _____, 101 S.Ct. 2599, 69 L.Ed.2d. 357 (1981).

The only issue presented in this case which purports to raise a substantial federal question is a nihility. Petitioners claim that they have been barred from litigating their constitutional challenges to Reg. Secs. 30-6-A24(d) and (e). However, even a cursory reading of the trial court's memorandum of decision demonstrates that all the issues raised by Petitioners were heard and decided on their merits.

ARGUMENT

In their petition, Petitioners attempt to create an issue which could be considered a substantial federal question by construing the lower court's opinion as if it barred their opportunity to challenge Reg. Secs. 30-6-A24(d) and (e). The argument cannot be raised at this late hour in the litigation. Furthermore, all of Petitioners' issues concerning the regulations were argued and decided by the lower court correctly.

1. PETITIONERS CANNOT CHALLENGE THE VALIDITY OF C.G.S. SEC. 4-168(c) IN THE PETITION FOR CERTIORARI BECAUSE THE ISSUE WAS NEVER RAISED, BRIEFED OR DECIDED IN THE COURTS BELOW.

For the first time in the history of this litigation, Petitioners challenge the validity of C.G.S. Secs. 4-168(c), a statute which establishes a two year time limit on the initiation of lawsuits claiming procedural defects in the manner in which regulations were adopted under the Connecticut Uniform Administrative Procedure Act. C.G.S. Secs. 4-166 et seq. None of the pleadings or briefs filed raise this issue. See Respondent's Appendix A, B,

C, D and E at p. 1a-12a. Only arguably is there a vague reference in Respondent's Appendix E at p. 12a.

Petitioners cannot, at this late date, raise such a new issue in the Petition for Writ of Certiorari. Such an issue must exist in the record, *Tyrrel* v. *District of Columbia,* 243 U.S. 1, 37 S.Ct. 361, 61 L.Ed. 557 (1917) and must have been urged and briefed below, *California* v. *Taylor,* 353 U.S. 553, 557, n.2, 77 S.Ct. 1037, 11 L.Ed.2d 1034 (1957). See also *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147, n.2, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Lawn* v. *United States,* 355 U.S. 339, 862 n. 16, 78 S.Ct. 311, 2 L.Ed.2d. 321; Stern and Gressman, *Supreme Court Practice* (5th Ed.) Sec. 6.27 at p. 457. This rule applies as well to constitutional issues not raised below. See *Duignan* v. *United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 989 (1927).

Only in "exceptional circumstances" will the court deviate from its normal practice of declining to consider issues not pressed or passed upon below. *Duignan,* supra at p. 200. No such circumstances exist in the instant case. Indeed, the circumstance which Petitioners complain of — that Connecticut employed C.G.S. Sec. 4-168(c) to bar them from litigating the constitutionality of Reg. Secs. 30-6-A24(d) and (e) — does not exist. As a cursory review of the lower court decision illustrates, Petitioners, in fact, litigated all the issues raised and the court decided all such matters on their merits.

2. SECTION 4-168(c) OF THE CONNECTICUT GENERAL STATUTES WAS NOT EMPLOYED BY THE CONNECTICUT COURTS TO BAR PETITIONERS FROM CHALLENGING THE CONSTITUTIONALITY OF THE RESPONDENT'S NUDE CONDUCT REGULATION.

Petitioners' interpretation of the trial court's application of C.G.S. Sec. 4-168(c) in this case is warped. The court was quite deliberate in distinguishing the procedural claims in the case from the constitutional challenges. The court, quite correctly, noted that the alleged deficiencies, such as insufficient fact find-

ing prior to promulgation of the regulation and inadequate statement of purpose "amounted to a procedural challenge." See Petitioners' Exhibit B at p. A5. The court went on to rule that, "subsection (c) mandates that actions claiming non-compliance with the APA requirements be commenced within two years of the contested regulation's effective date." Petitioners' Exhibit B at p. A6.

Thus the court ruled that some of the arguments were procedural challenges to the 1976 rule-making action, which attacks were precluded, because untimely under Sec. 4-168(c). Having said this, the court went on (assuming arguendo the Petitioners' ability to raise the procedural issues) and decided that Respondent's regulations were adopted strictly in accord with the 1976 requirements of the Connecticut Uniform Administrative Procedure Act. Petitioners' Exhibit B at p. A6. The court then proceeded, in Section II of its decision, to address all of Petitioners' constitutional challenges to the regulations in the context of an appeal from an adjudicatory hearing. Petitioners' Exhibit B at p. A7-A11.

Thus, the trial court decided the entire matter on its merits treating all issues raised. Plaintiffs cannot claim that they were not given an opportunity to litigate any issue. The alleged harm which they complain of is non-existent.

3. THE DIVISION OF LIQUOR CONTROL CONSIDERED AMPLE EVIDENCE PRIOR TO PROMULGATING REG. SECS. 30-6-A24(d) AND (e).

It is admitted that the Division, because of lack of fiscal resources, never commissioned any organization or pollster to conduct a survey or engage in the surveillance of permit premises prior to the 1976 regulation-making hearing. Nor were any formal reports published and presented to the liquor commissioners at said hearing. However, the commissioners considered ample evidence.

The transcript of the rule-making hearing speaks for itself on this score, and what it says, loudly and clearly, is that the impact of nude entertainment on permit premises was well known to the liquor commissioners. See Respondent's Appendix F at p. 14a. Indeed, the whole purpose of the regulation was *not* to embark on a voyage into an uncharted area of regulation, but to revamp an existing regulation in light of this court's ruling in *California* v. *LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d. 342 (1972). Prior to 1976, the predecessor regulation prohibited "lewdness" and "immoral activities." See Reg. Sec. 30-6-A24(a). Respondent's Appendix G. In the context of the above, it is clear that the proposed regulations were aimed at curbing some of the same "problems" so graphically illustrated in *LaRue,* i.e. the unlawful and disorderly conduct which so often springs from the combination of alcohol and nude entertainment.

The trial court correctly ruled, "The evidence offered establishes compliance with the 1976 requirements of proper notice and hearing affording interested persons an opportunity to be heard." Petitioners' Exhibit B at p. A6. It further noted that courts may not require agencies to adopt procedures beyond those required by the APA, citing *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 455 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d. 460 (1978). It was not until 1980 that the Connecticut Legislature required administrative agencies to articulate considerations after rule-making hearings. P.A. 80-471, Sec. 2.

4. THE DIVISION OF LIQUOR CONTROL DID NOT ABUSE ITS DISCRETION WHEN IT PROMULGATED REG. SECS. 30-6-A24(d) AND (e).

Even though all procedural requirements were satisfied in the enactment of Reg. Secs. 30-6-A24(d) and (e), the due process clause requires that, in order to be constitutional, the liquor regulation must be rationally related to a valid regulatory purpose. See *Inturri* v. *Healy,* 426 F.Supp. 543, 547 (D.Conn., 1977).

The record in the adjudicatory hearing below, which can be made available to the Supreme Court if it so requires, is replete with testimony identifying the connection between topless dancing and the potential for unlawful and disorderly conduct at liquor permit premises. Examples appear in Respondent's Appendix H and I at p. 19a and 20a. Quite correctly, the lower court found "...plaintiffs have failed to show that the challenged regulations are not rationally related to the furtherance of a legitimate state interest." Petitioners' Exhibit B at p. A9.

5. CONNECTICUT CAN, AS PART OF ITS LIQUOR LICENSING PROGRAM, BAN TOPLESS DANCING AT LIQUOR PERMIT PREMISES.

It is beyond any reasonable doubt, at this stage in the evolution of the law on point, that a state liquor agency can ban topless dancing at liquor permit premises as part of its liquor licensing program and as an exercise of its Twenty-first Amendment powers under federal laws. This was made clear most recently in *New York State Liquor Authority* v. *Bellanca,* supra, citing *Doran* v. *Salem Inn, Inc.,* 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d. 648 (1975); See also *Gabriele* v. *Town of Old Orchard Beach,* _____ Me. _____, 420 A.2d. 252 (1980), *Barmat* v. *Robertson,* 125 Ariz. 514, 611 P.2d 101 (1980), app. dis., 449 U.S. 894, 101 S.Ct. 259, 66 L.Ed.2d. 124; *Bundo* v. *Michigan Liquor Control Commission,* 92 Mich. App. 20, 407 Mich. 900, 283 N.W.2d. 860 (1979) app. dis., 50 U.S.L.W. 3243.

CONCLUSION

This case was correctly decided below in accord with clear, recent precedent established by this court and the Petition for Writ of Certiorari presents no substantial federal question.

WHEREFORE, respondent respectfully requests the court to enter an order denying the Petition for Writ of Certiorari.

Respectfully submitted,

Carl R. Ajello
Attorney General

By:

/s/Robert F. Vacchelli
Robert F. Vacchelli
Assistant Attorney General

/s/Richard M. Sheridan
Richard M. Sheridan
Assistant Attorney General

Attorneys for Respondent

Dated: March _____, 1982
Newington, Connecticut

Appendix

NO. 81-1454

In The

Supreme Court of the United States

OCTOBER TERM, 1981

PAUL J. CIANCI, ET AL.
Petitioner,

V.

DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION
Respondent.

AND

VICTOR R. DYDYN, ET AL.
Petitioner,

V.

DIVISION OF LIQUOR CONTROL
DEPARTMENT OF BUSINESS REGULATION
Respondent.

APPENDIX

TABLE OF CONTENTS

	Page
A. Complaint in *Victor R. Dydyn v. Division of Liquor Control*	1a
B. Complaint in *Paul J. Cianci* v. *Division of Liquor Control*	4a
C. Appeal to Appellate Session	8a
D. Appeal to Supreme Court	10a
E. Motion for Reconsideration	12a
F. Excerpts from Transcript of March 29, 1976	14a
G. Liquor Reg. Sec. 30-6-A24(a)	18a
H. Report on Special Investigation	19a
I. Excerpts from Transcript of December 20, 1979	20a

APPENDIX A

COMPLAINT IN
VICTOR R. DYDYN V. *DIVISION OF LIQUOR CONTROL*
DATED: APRIL 1, 1980

APPEAL FROM DIVISION OF LIQUOR CONTROL, DEPARTMENT OF BUSINESS REGULATION

TO THE SUPERIOR COURT IN AND FOR THE JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN, AT HARTFORD, IN THE COUNTY OF HARTFORD, ON THE THIRD TUESDAY OF APRIL, 1980, comes VICTOR R. DYDYN, of 1543 Willard Avenue, Town of Newington, County of Hartford, and State of Connecticut, permittee, and JOHN DYDYN, of 9 Carriage Hill Drive, Town of Wethersfield, County of Hartford, and State of Connecticut, backer, appealing from a decision of the Division of Liquor Control, and petitioning this Court to make a judicial review thereof, and complains and says:

1. The plaintiff, Victor R. Dydyn, is the holder of a Cafe Liquor Permit, No. CA-1075, and has been the holder of said permit at all times mentioned herein.

2. On September 4, 1979 the defendant, the Division of Liquor Control, notified the plaintiff of a compliance meeting, to be held September 13, 1979, which was held, and subsequently summoned the plaintiff to appear before the Division on December 20, 1979 to answer to the complaint and charges of the Division, the particulars of which are as follow:

> 1. On June 11, 1979 in the Town of Berlin you violated Section 30-A24 subsection (d) of the Regulations in that you did employ on the permit premises, BRIDEAU LOCKERY, unclothed or in such attire, costume or clothing exposing the portion of the female breast below the top of the areola.

2. On June 11, 1979 in the Town of Berlin you violated Section 30-6-A24 subsection (e) of the Regulations of the Commission: in that you did permit an entertainer or dancer, BRIDEAU LOCKERY, to display the portion of a female breast below the top of the areola.

AS MORE PARTICULARLY SET FORTH BELOW:

On June 11, 1979 investigation conducted by Inspector Hennessey indicated: Observed BRIDEAU LOCKERY attired in bikini type costume, occasionally opened top of costume to expose breasts to audience.

3. After said hearing, by notice dated March 11, 1980, said Division notified the plaintiffs that the aforesaid liquor permit had been suspended for a period of five days for the reasons set forth in paragraphs one and two of the complaint.

4. The aforesaid action by the Division prejudiced the substantial rights of the plaintiffs because said action violated the Fifth and Fourteenth Amendments to the Constitution of the United States and Article First of the Constitution of the State of Connecticut, in that:

A. Section 30-6-A24(d) and (e) of the Regulations of said Division has no rational basis, but is in fact based only upon the whim or disposition of the members of the Division.

B. Section 30-6-A24(d) and (e) of the Regulations of said Division are arbitrary and capricious, and an abuse of discretion, in that the Division failed to establish any ascertainable standard, rationale, purpose, or finding of fact upon which to base the Regulation, and is, therefore, violative of Constitutional due process standards.

C. Section 30-6-A24(d) and (e) of the Regulations of said Division is a gender-based classification, both on its face and in its application.

5. The aforesaid action of said Division prejudiced the substantial rights of the plaintiffs because said action was arbitrary or capricious, or a clearly unwarranted exercise of discretion, in that:

(A) the Division acted beyond its power in relying upon Section 30-6-A24(d) and (e) to restrict the plaintiffs' and dancers' opportunity to earn a livelihood.

6. The aforesaid action of the Division prejudiced the substantial rights of the plaintiffs because said action was in excess of the statutory and constitutional authority and power of the Division, in that:

(A) no statement of purpose has ever been made by the Division;

(B) no rational and reasonable basis exists for the Division's regulations and subsequent actions.

Wherefore, the plaintiffs appeal from the suspension imposed by the Division of Liquor Control and prays the Court to reverse the decision of the Division; declare Regulation 30-6-A24(d) and (e) unconstitutional; stay the suspension order; and for such other relief as is proper.

Dated at Westport, Connecticut this 1st day of April, 1980.

VICTOR R. DYDYN and JOHN DYDYN (BACKER)

By /Leslie Byelas

Leslie Byelas, Their Attorney — #07762
Commissioner of the Superior Court
1804 Post Road East
Westport, Connecticut 06880
259-0599

APPENDIX B

COMPLAINT IN *PAUL J. CIANCI* V. *DIVISION OF LIQUOR CONTROL* DATED: NOVEMBER 7, 1980

APPEAL FROM DIVISION OF LIQUOR CONTROL, DEPARTMENT OF BUSINESS REGULATION

To the Superior Court in and for the Judicial District of Hartford-New Britain, at Hartford, in the County of Hartford, on the THIRD Tuesday of DECEMBER, 1980, comes PAUL J. CIANCI, of 220 Hanmer Street, City of Hartford, County of Hartford, and State of Connecticut, permittee, and THE DEALER'S CHOICE LOUNGE, INC., a Connecticut corporation, organized and existing under the laws of the State of Connecticut, having a principal office at 866 Wethersfield Avenue, Hartford, Connecticut, backer, appealing from a decision of the Division of Liquor Control, and petitioning this Court to make a judicial review thereof, and complains and says:

1. The plaintiff, Paul J. Cianci, is the holder of a Cafe Liquor Permit, No. CA 1922, and has been the holder of said permit at all times mentioned herein.

2. The defendant, the Division of Liquor Control, held a compliance meeting on July 29, 1980 and subsequently summoned the plaintiff to appear before the Division on August 26, 1980 to answer to the complaint and charges of the Division, the particulars of which are as follows:

> 1. On 3-13-80 in the Town of Hartford you violated Section 30-6-A24(d) Regulations in that you did employ on the permit premises a person, MARY JORDAN, unclothed or in such attire, costume or clothing exposing to view any portion of the female breast below the top of the areola.

2. On 3-13-80 in the Town of Hartford you violated Section 30-6-A24(e) Regulations in that you did permit an entertainer or dancer, MARY JORDAN, to display any portion of the female breast below the top of the areola.

3. On 3-13-80 in the Town of Hartford you violated Section 30-6-A24(d) Regulations in that you did employ on the permit premises a person, BRENDA COLEMAN, unclothed or in such attire, costume or clothing exposing to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva.

4. On 3-13-80 in the Town of Hartford you violated Section 30-6-A24(e) Regulations in that you did permit an entertainer or dancer, BRENDA COLEMAN, to perform acts of or acts which simulate masterbation; to display any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva, to remain in or upon the permit premises who exposes to public view any portion of the pubic hair, anus, cleft of the buttocks, vulva.

AS MORE PARTICULARLY SET FORTH BELOW:

On 3-13-80 3:45 p.m. Det. Walter Brach observed Mary Jordan just finishing dance on stage. Approx. 40 persons and she had nothing covering breasts. Getting dressed Brenda Coleman appeared, immediately removed all clothing except small article which appeared to be skirt or tube top which she had covering her stomach and groin area and nothing covering pubic area. Dancing pulled front of small skirt open exposing pubic area and touched herself with fingers of left hand. Continued dancing and pulling down skirt until buttocks and pubic area were exposed. Joseph Zinga-

relli sitting at bar watching girls dancing and advised of violations.

3. After said hearing, by memorandum of decision dated November 4, 1980, said Division notified the plaintiff that the aforesaid liquor permit had been suspended for a period of five days, for the reasons set forth in paragraphs 1 through 4, inclusive, of the complaint.

4. The aforesaid action by the Division prejudiced the substantial rights of the plaintiff because said action violated the Fifth and Fourteenth Amendments to the Constitution of the United States and Article First of the Constitution of the State of Connecticut, in that:

A. Section 30-6-A24(d) and (e) of the Regulations of said Division have no rational basis. but is, in fact, based only upon the whim or disposition of the members of the Division.

B. Section 30-6-A24(d) and (e) of the Regulations of said Division are arbitrary and capricious, and an abuse of discretion, in that the Division failed to establish any ascertainable standard, rationale, purpose, or finding of fact upon which to base the Regulation, and is, therefore, violative of Constitutional due process standards.

C. Section 30-6-A24(d) and (e) of the Regulations of said Division is a gender-based classification, both on [illegible]face and in its application.

5. The aforesaid action of said Division prejudiced the substantial rights of the plaintiff because said action was arbitrary or capricious, or a clearly unwarranted exercise of discretion, in that:

(A) the Division acted beyond its power in relying upon Section 30-6-A24(d) and (e) to restrict the plaintiff's and the dancers' opportunity to earn a livelihood.

6. The aforesaid action of the Division prejudiced the substantial rights of the plaintiff because said action was in excess of the statutory and constitutional authority and power of the Division, in that:

(A) no statement of purpose has ever been made by the Division;

(B) no rational and reasonable basis exists for the Division's regulations and subsequent actions.

Wherefore, the plaintiff appeals from the suspension imposed by the Division of Liquor Control and prays the Court to reverse the decision of the Division; declare Regulation Section 30-6-A24(d) and (e) unconstitutional; stay the suspension order; and for such other relief as may be proper.

Dated at Westport, Connecticut this 7th day of November, 1980.

PAUL J. CIANCI (PERMITTEE) and
THE DEALER'S CHOICE LOUNGE, INC. (BACKER)

By /s/Leslie Byelas

Leslie Byelas, Their Attorney — 07762
Commissioner of the Superior Court
1804 Post Road East
Westport, Connecticut 06880
259-0599

APPENDIX C

APPEAL TO APPELLATE SESSION
DATED: AUGUST 31, 1981

PRELIMINARY STATEMENT OF ISSUES

The Plaintiffs, PAUL J. CIANCI and VICTOR R. DYDYN, intend to present the following issues on the Appeal:

1. Did the Court err in finding that the regulations were promulgated on such a basis that the means selected to regulate were rationally related to the end to be achieved?

2. Did the Court err in basing its decision on *California* vs *LaRue,* 409 U.S. 109 (1972) and *New York State Liquor Authority* vs. *Bellanca,* U.S. No. 80-813, June 22, 1981, by failing to distinguish between the enactment of a statute by the legislature and the promulgation of a regulation by an administrative agency?

3. Did the Court err by ruling, contrary to the decision of Aspell, J., dated June 5, 1980, that Section 4-168(c) barred the Plaintiffs from prosecuting this cause of action?

4. Did the Court err by finding that Section 4-168(c) barred the Plaintiffs from raising the due process clauses of the United States and State of Connecticut Constitutions in this cause of action?

5. Did the Court err by finding that the Twenty-First Amendment gives the states absolute power to regulate the circumstances and conditions under which liquor may be sold?

THE PLAINTIFFS, PAUL J. CIANCI and
VINCENT R. DYDYN

BY: /s/Steven G. Mednick

STEVEN G. MEDNICK, Their Attorney
Gallant, Mednick & Gallant
P.O. Box 1428
New Haven, CT 06506
Juris #100782 624-2184

APPENDIX D

APPEAL TO SUPREME COURT
DATED: AUGUST 27, 1981

PETITION TO SUPREME COURT
FOR CERTIFICATION FOR REVIEW

To the Honorable Chief Justice and Associate Judges of the Supreme Court.

The undersigned respectfully represent:

1. They are party plaintiffs in the above entitled action.

2. They are aggrieved by the decision of the court upon questions of law arising in the trial of the action, and desire to appeal from the final judgment to the Supreme Court.

3. The plaintifs, both operators of Cafe's were found by the Division of Liquor Control, in separate hearings to have violated section 30-6-A24(d) and (e) of the Division of Liquor Control Regulations which prohibit nude activity and imposed a five day suspension of their permits.

4. Both plaintiffs appealed to the Superior Court and their cases were consolidated and tried to the court simultaneously as the same issues were raised.

5. The plaintiffs in the case have consistently restricted their arguments to the way the regulation was promulgated by the Division of Liquor Control and argue there is no rational basis for it.

6. In *California* v. *LaRue,* 409 U.S. 109 (1972) and in *New York State Liquor Authority* v. *Bellanca,* U.S. , No. 80-813, June 22, 1981 the Supreme Court dealt with State Statute's not a regulation promulgated by an administrative agency as these cases do.

7. In *Dydyn,* prior to the consolidation of *Dydyn and Cianci* and prior to the hearing on the merits, the State moved to dismiss on the grounds that the plaintiffs failed to bring the action within the deadline established by §4-168(c).

8. After the plaintiff and defendants briefed the issue and had oral argument, Aspell, J. denied the motion holding the plaintiffs have a right of appeal which allows the court to review claims of error in the agency proceedings. (Memorandum attached hereto as Exhibit A)

9. Morelli, J. reached the opposite conclusion in holding that the plaintiffs are barred by C.G.S. 4-168(c) in pursuing this line of arguments (Paragraph 5 above) in his Memorandum of Decision from which the Certification for Review is sought.

10. In addition to the foregoing, the court failed to address the issue's concerning the basis upon which the Division promulgated the regulation.

11. In conclusion the Supreme Court should allow certification to resolve the opposite decision by two Superior Court Judges and failure to address the merits of the claims. In *Inturri* v. *Healy,* 426 F. Supp 543 (1977) and *LaRue* only "facial attacks were made unlike the claims here and where the plaintiffs licenses are subject to suspension here and were not in *Inturri* v. *LaRue.*

WHEREFORE, the undersigned requests that the Supreme Court certify this matter for review.

PAUL J. CIANCI, ET AL AND
VICTOR R. DYDYN, ET AL

By _____
Their Attorney

APPENDIX E

MOTION FOR RECONSIDERATION BY THE SUPREME COURT DATED: OCTOBER 23, 1981

MOTION FOR RECONSIDERATION

The plaintiffs respectfully move for reconsideration of the denial of their petition for certification to the Supreme Court.

PAUL J. CIANCI, ET AL AND
VICTOR R. DYDYN, ET AL

BY /s/Leslie Byelas
Leslie Byelas
Their Attorney

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

This case represents the threshold issue of two Judges of the Superior Court rendering opposite decisions on the same issue; One Judge found that the plaintiffs' Constitutional attack on a liquor regulation is barred by the two year statute in C.G.S. 4-168(c) and the other Judge found that the plaintiffs have a statutory right of appeal which allows the court to review alleged violations of the Constitution pursuant to C.G.S. 4-183.

In addition to the foregoing* the plaintiffs will have never had the merits of their claims reviewed. The injustice of this result is compounded by the fact that the legislature as of July 1, 1981 has made available by statute the right of appeal to the Appellate Session from a decision of the Superior Court after appeal to the Superior Court from an Administrative Decision.

---

*Morelli, J. opinion must be considered dictum in view of his decision to dismiss the appeal on the grounds it was barred by C.G.S. 4-168(c).

The plaintiffs through their attorneys have filed extensive briefs with the Division of Liquor Control and the Superior Court raising issue not raised in any of the leading Connecticut cases, state and federal and in *California* v. *LaRue,* 408 U.S. 109 (1972).

To prevent an injustice, where the liquor permits of the plaintiffs are in jeopardy, the plaintiffs respectfully request an opportunity to be heard on the merits by the Supreme Court of the State.

PAUL J. CIANCI, ET AL AND
VICTOR R. DYDYN, ET AL

BY /s/Leslie Byelas
Leslie Byelas
Their Attorney

APPENDIX F

EXCERPTS FROM TRANSCRIPT OF RULE-MAKING HEARING CONDUCTED ON MARCH 29, 1976 RE: SECS. 30-6-A24(d) AND (e)

MR. HEALY: Your name?

MR. O'DELL: Attorney Frederick O'Dell.

MR. HEALY: And your address?

MR. O'DELL: Main Street, Wethersfield.

No questions. I would just like to make some comments, some general observations if that is all right with the Commission.

First of all, I think my purpose here this morning is to represent not only the two or three bars that I represent that feature go-go dancers, female entertainers, dancing to music in discos, but also I am here representing the girls who do the dancing, and basically in this particular case, it is the Madeline Agency. They supply many of the girls to the local bars that have this kind of entertainment.

I believe you will also recognize that I am no stranger to this Commission; I have been here before. We have been through many heated hearings concerning the conduct of the permit premises and the go-go dancers.

My first observation as an attorney are the rules which were proposed by the Attorney General and I have spoken to Mr. Sheridan concerning these rules. They are a tremendous improvement over the previous existing rules. They are something that attorneys can live with, owners of permit premises can live with, and entertainers themselves can live with.

If we go through old regulations, we see that no lewd or immoral conduct shall be allowed, and, of course, the arguments that we had here before the Commission on many days concerned exactly what those words were.

In the new regulations we have very explicit language, language that says what performers may wear, what they may not wear, and what parts of the body may be exposed. So in general, the wording of the regulation is quite acceptable.

It is something that will prevent the many borderline type arguments that appeared here before the Commission.

One very small item that I would take exception to — but not necessarily as an attorney, but as a citizen, and the girls take exception to — is that portion of the proposed regulation which would prohibit any portion of the female breast below the top of the areola from being exhibited.

I believe that the Commission is aware that a traditional form of American entertainment has been burlesque and has been strip-tease. I know there have been occasions when the Commission in effect has told the go-go dancers on one hand that they may not wear certain dress which the Commission has allowed in more traditional types of entertainment. Specifically, the form I am speaking of is when the Ann Curio show came to one of the dinner theatres. In the Commission's judgement, because it was strip-tease and because it was traditional and burlesque being itself, girls would be allowed to go to what we call pasties.

On the other hand, it was thought that the go-go girls in the various permit premises should not be allowed to go as far as the traditional or legitimate strip-tease, as it might be called.

So I think that while the regulations are good in defining what can be done on the permit premises, the problem is that at the present time, exotics may appear in permit premises and have been allowed to strip to pasties, that traditional form of

entertainment. When the Ann Curio show comes in, they have been allowed to strip to pasties, and, of course — it's embarrassing for me to talk about this here — I think the Commission is perhaps taking a step backwards from what is allowed today and to what might be allowed tomorrow.

I think that the traditional entertainment, the traditional burlesque, if properly supervised, if properly regulated, is something that the permit premises can live with, and it would be up to this Commission to define under what statutes that part of the American tradition would be allowed.

There, in short, is the only objection we would have.

We think that the Commission is proper in what can happen, but we think we ought to hold what the girls are allowed to do. I have gone over the regulation with Mr. Sheridan. I understand that many of the provisions of the regulation come from the California law. That California law has been upheld by the Supreme Court, so I'm sure there would be no problem with constitutional validity.

I thank the Commission for listening to me, and perhaps if you have any questions, I could answer them.

MR. HEALY: I have no questions, counsel. The only thing I have to say in regard to the burlesque, it would be different taking this burlesque out of a dinner theatre and putting it into a particular cafe or restaurant.

Now if it was presented to us — I'm speaking for myself — we probably wouldn't have allowed it in a cafe or restaurant. When it was in a dinner theatre we did allow it, because it was, as we interpreted at the time, a traditional type of show in a theatre, or on a stage well removed from the audience because of the physical layout.

It is very difficult. One of the reasons for these regulations is, as you say, when do you call it a burlesque or when do you call it a theatre, how big is the stage, how far away is it.

I would say that someone who has a different type of operation might feel that the Commission was being discriminatory, but the basic premise that at that time that was in a theatre, but because somebody calls it a theatre, it is still a cafe, a bar, a night club, or what have you. So what we want to do, what we intend to do, is be completely consistent in any of these rulings, so that anybody knows that when they start out, if they stay within the guidelines, they are going to get treated equally as long as they are subject to the rules of this Commission.

MR. O'DELL: I would hate to see the traditional form of burlesque and strip-tease, which is legitimate and which is a proper form of entertainment, eliminated just because of problems that are raised with other owners. I would ask the Commission to consider the possibility of perhaps allowing the legitimate part of strip-tease or burlesque being only certain premises, and in that regard I would say only in restaurants where the barroom is separate from the dining area and there is a separate area set apart where a stage could be erected, and then the Commission could continue to prohibit the strip-tease from the cafes and taverns or wherever else the girls might perform.

MR. HEALY: Thank you.

Is there anyone else here who has any questions in regard to this change in the regulation? There being no comment, the Commission will consider this hearing on the regulation closed.

Thank you.

APPENDIX G

TEXT OF PREDECESSOR TO REG. SECS. 30-6-A24(d) AND (e)

Regulation 30-6-A24(a)

> "(a) No disturbances, lewdness, immoral activities, brawls, unnecessary noises, including loud and disturbing music, unlawful conduct or gambling of any kind except where provided by Public Act 865 of the 1971 General Assembly, and no slot machines or gambling devices which may be used for the purpose of securing money or any other valuable things, shall be permitted or suffered upon any permit premises, nor shall such premises be conducted in such a manner as to constitute a nuisance."

APPENDIX H

REPORT ON SPECIAL INVESTIGATION RE: SURFSIDE CAFE, FAIRFIELD, CONN., JULY 18, 1980 MARKED COMMISSION EXHIBIT 1

On June 25th, 1980, the above cafe business held a "T" Shirt contest on the premises. This contest was advertised locally and member of the Fairfield Police Detective Bur., including it's commander, Capt. Edward Tarzowski contacted the permittee and backer of the business. The permittee invited the detective squad to view the contest, which was to be performed on the patio portion of the premises. The affair was attended by approximately (300) young patrons. Shortly after the contest began the crowd became boisterous and began shouting obsenities. Some of the exhibitioners responded to the crowds request and began removing their clothing. Employees of the cafe tried to stop the performers but were not completely successful. Attached are reports released to this agent after I was contacted by the Chief of Detectives Edward Targowski with permission of Chief Mockalis. It will be noted that no arrests were made as there was fear of causing a riot with the instable crowd that had massed on the patio for the contest. The contest had been publicized in the Advocate paper.

All of the detectives are available as witnesses.

On 5/27/80 an application for the use of the patio and the installation of a consumer bar on the patio was submitted to the L.C.C. by this agent stating an injunction was placed against the use of the patio by the Town of Fairfield and a hearing was scheduled in Superior Court, as stated by Mr. Walter McMahon. It appears there were not enough parking spaces available for use of the patio portion of the premises. It is not known if the L.C.C. permission for use of the patio and alteration request.

EXHIBIT I

EXCERPT FROM TRANSCRIPT OF RULE-MAKING HEARING, P. 67 CONDUCTED ON DECEMBER 20, 1979 RE: REG. SECS. 30-6-A24(d) AND (e)

"COMMISSIONER SNYDER: I think also it should be pointed out that it has been the experience of this Commissioner that this regulation served to prevent unlawful and disorderly conduct on the permit premises. We have had cases, where after a violation of this regulation has occurred, there have been brawls. There have been arrests for sexual contact. It has served a purpose in the past, and it continues to serve a purpose. I can only speak for myself, but that has been my experience."